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RE MAHESWARY RAMASAMY, EX P BSN COMMERCIAL BANK (MALAYSIA) BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[BANKRUPTCY NO: 29-1500-1998]
b 30 AUGUST 2001

BANKRUPTCY: *Creditor's petition - Application to set aside - Failure to file Form 16 to show cause against creditor's petition - Whether application invalid - Bankruptcy Rules 1969, r. 117*

c ***BANKRUPTCY:*** *Notice - Application to set aside - Debtor's intention to set aside notice - Whether application should be by way of summons in chambers or by filing an affidavit - Bankruptcy Rules 1969, rr. 18, 95(1)*

CIVIL PROCEDURE: *Appeal - Notice of appeal - Whether fundamentally* d *flawed*

This was an appeal by the judgment debtor against the registrar's decision dismissing her application under rr. 117 and 18 of the Bankruptcy Act 1967. Since the Bankruptcy Act 1967 contains "sections" rather than "rules", the notice of appeal contained an error which would render it e defective. However, the notice of appeal was still considered on the basis that the appeal was proceeded with in the light of rr. 117 and 18 of the Bankruptcy Rules 1969 ('the Rules').

Held:

f **[1]** Rule 117 of the Rules specifically requires the use of Form 16 Appendix to the Rules where a debtor such as the judgment debtor herein intends to show cause against a creditor's petition. Since the judgment debtor never filed Form 16, there was no application under r. 117 of the Rules.

g **[2]** The judgment debtor's application by way of summons in chambers instead of an affidavit in Form 7 to set aside a bankruptcy notice, contravened the express provisions of r. 95(1) of the Rules, which was an exception under r. 18 of the Rules. Hence, there was no application h by the judgment debtor under r. 18 of the Rules.

[Appeal dismissed.]

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Legislation referred to:
Bankruptcy Act 1967, ss. 117, 118
Bankruptcy Rules 1969, rr. 18(1), (2), 95(1), 117, 118

For the judgment creditor - Evelina Appaduray; M/s EJ Appaduray & Co
For the judgment debtor - Hariharan Kuppusamy; M/s Hari Haran & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:
The notice of appeal dated 19 November 1999 filed by the appellant (judgment debtor) in encl. (21) reads as follows:

> AMBIL PERHATIAN bahawa Penghutang Penghakiman yang dinamakan di atas bercadang hendak merayu terhadap keseluruhan keputusan oleh Pendaftar yang diberikan pada 18hb November, 1999 memerintahkan bahawa permohonan Penghutang Penghakiman di bawah Kaedah 117 dan Kaedah 18 Akta Kebankrapan 1967 ditolak dengan kos.
>
> [Translation: TAKE NOTICE that the abovenamed Judgment Debtor intends to appeal against the whole of the decision of the Registrar given on 18th November 1999 ordering that the Judgment Debtor's application under Rule 117 and Rule 18 of the Bankruptcy Act 1967 be dismissed with costs.]

The written submissions filed for the judgment debtor and the judgment creditor respectively made no mention of the defects found in this notice of appeal, which specifically stated that the appeal was against the learned registrar's decision dismissing the judgment debtor's application under "r. 117 and r. 18 of the Bankruptcy Act 1967". At first glance, it is not difficult to identify the fundamental flaws manifested therein. Any learned member of the Bar would not fail to learn that the Bankruptcy Act 1967 contains "sections" rather than "rules". It is therefore not surprising that rr. 117 and 18 could not be found in the Bankruptcy Act 1967. What can be found in the Act are ss. 117 and 18, respectively providing for "prosecution for offences", and "powers for creditors to accept and court to approve composition or arrangement". That being the case, the judgment debtor's application expressed to be "under r. 117 and r. 18 of the Bankruptcy Act 1967" in the said notice of appeal was not the application which was properly, accurately or correctly stated. The error contained in the said notice of appeal is so substantial and fundamental as to render the said notice of appeal defective, since the application stated therein could not be identified and indeed was non-existent in the file before me. Be that as it may, it is possible that learned counsel for the judgment debtor has mistaken the Bankruptcy Act 1967 for the Bankruptcy Rules 1969

wherein the rules regulating bankruptcy matters are explicitly contained. I shall therefore proceed to consider the said notice of appeal on the basis that the appeal is proceeded with in the light of r. 117 and r. 18 of the Bankruptcy Rules 1969. Rule 117 thereof provides for the procedure by which a debtor may proceed to show cause against a creditor's petition and reads as follows:

> **117 Debtor intending to show cause**
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> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

Rule 117 specifically requires the use of Form 16 Appendix to the Bankruptcy Rules 1969 where a debtor such as the judgment debtor herein intends to show cause against a creditor's petition. Upon a careful perusal of the cause papers in the matter before me, I could not find any Form 16. It is only reasonable to conclude that learned counsel for the judgment debtor has never filed Form 16 as specifically required under r. 117, in which case, there is no application for the judgment debtor under r. 117.

Rule 18 was expressly stated in the said notice of appeal. Rule 18(1) sets out the general procedure to be followed in every application to the court. Two exceptions are expressly provided under r. 18(1). For completeness, the entire provision of r. 18(1) and (2) are reproduced as follows:

> **18 Applications to be made by summons in chambers**
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> (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
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> (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

However, only r. 18(1) above is relevant here.

As alluded to above, proper construction to be placed on r. 18(1) is that, as a general rule, every application to the court shall be made by summons in chambers supported by affidavit. However, two exceptions are inherent in r. 18, *viz*.

(a) where the Bankruptcy Rules or the Bankruptcy Act otherwise provide, in which case, the specific mode of application under the said Rules or Act would apply; and

(b) where the Chief Justice (now the Chief Judge) otherwise directs, in which case that specific direction would apply.

What transpired in the matter before the learned registrar and also on appeal to me was that learned counsel for the judgment debtor has filed encl. (19) by way of summons in chambers to set aside the bankruptcy notice dated 12 May 1998 and creditor's petition dated 11 March 1998. This procedure adopted by learned counsel for the judgment debtor appears to have contravened the express provisions of r. 95(1) of the Bankruptcy Rules 1969. Rule 95(1) provides for the application to set aside a bankruptcy notice and is couched in the following words:

95 Application to set aside

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

The correct and specific procedure for an application to set aside a bankruptcy notice is by way of an affidavit in Form 7 and not by way of summons in chambers in encl. (19).

Further the judgment debtor's application by way of summons in chambers to set aside the creditor's petition is manifestly erroneous. It has been clearly provided for in r. 117 and an application to set aside a creditor's petition is indeed to show cause against the petition and should be done by filing a notice in Form 16 with the registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

The only conclusion that can be drawn in the appeal before me is that there was no application by the judgment debtor under either r. 117 (which must be by way of a notice in Form 16) or r. 18 (which contains exceptions, one of which is specifically to be found in r. 95(1), which must be by way of an affidavit in Form 7). I therefore hold that the said notice of appeal being fundamentally flawed, and therefore incompetent, is hereby struck out *in limine.*

This is sufficient to dispose of this appeal before me. As learned counsel for the respective judgment debtor or the judgment creditor has not addressed me on the above issues, I make no order as to costs in respect of this appeal.